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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 491

ALBERT ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 494

ROBERT L. DONOVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 74–77) is reported at 301 F. 2d 376. Prior opinions of the court of appeals are reported at 242 F. 2d 61 and 252 F. 2d 788, certiorari denied, 357 U.S. 940 (as to Andrews), and 358 U.S. 851 (as to Donovan). A prior opinion of the district court is reported at 170 F. Supp. 380, affirmed, 263 F. 2d 608, certiorari denied, 360 U.S. 904.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1962 (R. 78). Andrews' petition for a writ of certiorari (No. 491) was filed on April 14, 1962. A petition for rehearing by Donovan was denied on April 27, 1962 (R. 79). On May 24, 1962, Mr. Justice Harlan extended the time for the filing of Donovan's petition for a writ of certiorari to June 26, 1962, and the petition (No. 494) was filed on June 25, 1962 (R. 80). On October 8, 1962, the Court granted the petitions for writs of certiorari (R. 80–81; 371 U.S. 812). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to entertain an appeal by the government from the grant of each petitioner's motion to have his sentence vacated on the ground that he had not been asked, at the time of sentencing, if he wished to speak in his own behalf.

2. Whether the court of appeals properly reversed the orders of the district court vacating the sentences.

STATUTES AND RULE INVOLVED

Section 2114 of Title 18, U.S.C., provides in pertinent part:

> Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other

> property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon * * * shall be imprisoned twenty-five years.

Section 2255 of Title 28, U.S.C., provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to imposed such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court to vacate, set aside or correct the sentence.
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> * * * * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> * * * * * *

Rule 32(a), F. R. Crim. P., provides:

> Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall

> afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 35 of the Federal Rules of Criminal Procedure provides in pertinent part:

> *Correction or Reduction of Sentence.* The court may correct an illegal sentence at any time. * * *

STATEMENT

A three count indictment returned in October 1954 in the United States District Court for the Southern District of New York charged the petitioners and one Hyman Cohen with having assaulted a postal employee with intent to rob (count 1), with having assaulted with a dangerous weapon a postal employee with intent to rob (count 2), and with having conspired to commit robbery of a post office (count 3), in violation of 18 U.S.C. 2114 (R. 1, 12–14). After a jury trial, the petitioners and Cohen were found guilty as charged. On December 31, 1954, Judge Walsh sentenced each defendant to concurrent terms of imprisonment of twenty-five years on count two and to five years on count three. No sentence was imposed on count one which merged into count two. (R. 15, 16–17, 18–19.) On appeal, the court of appeals affirmed the convictions but remanded the case for resentencing of all defendants on the count charging assault with a dangerous weapon because the district judge had erroneously concluded that he lacked the power to suspend sentence and grant probation on that count. *United States* v. *Donovan*, 242 F. 2d 61 (C.A. 2).

Resentencing of the petitioners and Cohen was scheduled for May 20, 1957. At that time, Judge Walsh, in the presence of the Assistant United States Attorney and counsel for the petitioners and Cohen, immediately inquired whether the defendants were present and was told by counsel for the petitioners that they were "on their way up" (R. 21). Prior to the appearance of the petitioners and Cohen in court, counsel for the petitioners began addressing the court regarding the court's sentencing power—in particular, the merger of count one into count two and the authority of the court under the probation statute. Counsel also requested the court to grant the defendants some consideration for the time already spent in prison (R. 21–24). The Assistant United States Attorney responded very briefly to the question of the court's power, stating that the jurisdiction of the court was limited to resentencing on count two and that the court must either give the defendants a suspended sentence or a sentence of twenty-five years on that count (R. 24, 25). The court then terminated the short discussion because of the absence of the defendants (R. 25).

When the defendants had appeared, the actual sentencing proceedings commenced. The Assistant United States Attorney briefly summarized the role of each defendant in the crime, and counsel for each of the petitioners told the court about extenuating circumstances which would justify probation on count two for each petitioner (R. 26–27, 28–30).

At the conclusion of these statements, the court said that it would not suspend the 25-year sentences

imposed as to the petitioners, "the two men who perpetrated the holdup of the truck" (R. 30–31). The court suspended the 25-year sentence as to Cohen because he had not accompanied the petitioners to the scene of the holdup (R. 31). On May 29, 1957, the court entered orders reaffirming the December 1954 sentences imposed on the petitioners on count two (R. 33, 34). The judgments as to the petitioners were affirmed on appeal, and certiorari was denied. See *United States* v. *Donovan and Andrews*, 252 F. 2d 788 (C.A. 2), certiorari denied, 357 U.S. 940, 358 U.S. 851.

The instant proceedings commenced on April 17, 1961,[1] when Donovan filed in the district court a "motion to vacate illegal sentence" (the 25 year sentence) on the ground that he had not been afforded an opportunity to make a statement in his own behalf either at the time of original sentencing or at the time of resentencing (R. 35). In a letter to the clerk, petitioner requested that his "motion to vacate under the provisions of Rule 35, Federal Rules of Criminal Procedure" be filed and requested the clerk to file an enclosed notice of appeal in the event of denial of the motion because "under Rule 35 [he] would have only

[1] In 1958, petitioner Andrews unsuccessfully moved under Rule 35, F.R. Crim. P., for correction or reduction of sentence. *United States* v. *Andrews*, 170 F. Supp. 380 (S.D.N.Y.), affirmed, 263 F. 2d 608 (C.A. 2), certiorari denied, 360 U.S. 904. In 1959, petitioner Andrews filed a motion to set aside the conviction which was treated as a motion to vacate judgment under 28 U.S.C. 2255 and denied without a hearing. Leave to appeal in forma pauperis was denied by the district court and the court of appeals, and this Court denied a petition for a writ of certiorari. 363 U.S. 854.

10 days to appeal" (R. 38). Thereafter, Donovan filed a brief "Supplement to Motion Filed Under Rule 35, Federal Rules of Criminal Procedure" in which he called the court's attention to the case of *Van Hook* v. *United States,* 365 U.S. 609 (R. 39). On June 16, 1961, District Judge Murphy granted the motion and ordered that Donovan be returned for resentencing on the ground that "at no time did Judge Walsh ask the defendant whether he had anything to say, although defendant's counsel was heard at length. We gather from *Green* and *Van Hook* this is not enough. Accordingly, it would appear that the defendant's right of allocution was denied him" (R. 40). Thereafter, the United States Attorney noted an appeal to the court of appeals and the district court entered an order staying its June 16th order until disposition of the appeal (R. 48–49, 58).

On July 19, 1961, the following letter from petitioner Andrews to District Judge Murphy was filed (R. 49–50):

> It is my understanding that this Honorable Court vacated the judgment of my codefendant, Robert L. Donovan, on June 16, 1961, because his right of allocution was denied him. Rule 32(a) of the Federal Rules of Criminal Procedure; Green v. United States, 365 U.S. 301; and Van Hook v. United States, 365 U.S. 609.
>
> Since the identical circumstances exist with me, I very respectfully request that this Honorable Court vacate my judgment. Thank you.

The court granted the request for resentencing on July 18, 1961 (R. 50). Thereafter, the United States Attorney noted an appeal and the district court entered an order staying its order of July 18th until disposition of the appeal (R. 52, 55).

Petitioners thereafter filed motions in the court of appeals for admission to bail and for dismissal of the government's appeal on grounds of lack of jurisdiction (R. 59, 60–61, 64–67, 69–70). The court of appeals denied the applications for bail and deferred ruling on the motions to dismiss the appeals until oral argument of the appeals (R. 64, 68, 73). On March 23, 1962, the court of appeals reversed the orders of the district court and remanded the cause with instructions that the petitions be dismissed (R. 74–77, 78).

SUMMARY OF ARGUMENT

I

Petitioners' motions to vacate their sentences because they were not properly accorded their rights of allocution would not lie under Rule 35 of the Federal Rules of Criminal Procedure. *Hill* v. *United States*, 368 U.S. 424; *Machibroda* v. *United States*, 368 U.S. 487. Motions to vacate sentence because of improper sentencing procedures lie, if at all, under 28 U.S.C. 2255. Regardless of how the petitioners described their motions, the fact that they were seeking a vacation of their sentences on grounds of improper sentencing procedures required the district court to consider their motions under 28 U.S.C. 2255—the

proper statutory provision—rather than under Rule 35 upon which they mistakenly relied; and required the court of appeals, for purposes of review, to consider any relief accorded as having been granted under the proper statutory authority, 28 U.S.C. 2255. The United States was plainly entitled to appeal from the vacation of the petitioners' sentences under 28 U.S.C. 2255, for this judgment of the district court was a final reviewable decision in a civil proceeding which was collateral to and independent of the criminal conviction.

II

The district court erred in granting the motions and vacating the sentences since the mere failure on the part of the court to ask a defendant, represented by counsel, whether he wished to make a statement in his own behalf before sentencing is not cognizable on collateral attack. *Hill* v. *United States, supra,* 368 U.S. 424; *Machibróda* v. *United States, supra,* 368 U.S. 487. There were in this case no circumstances of aggravation surrounding the failure to comply with the formal requirements of Rule 32(a) of the Federal Rules of Criminal Procedure sufficient to make the applications cognizable on collateral attack. The record refutes the claim that the sentencing judge was misformed as to the nature of Andrews' participation in the attempted robbery. Moreover, the court committed no error when, while awaiting the arrival in court of the petitioners, it heard a short preliminary

discussion of its sentencing powers by counsel for all parties. Even if permitting this discussion to take place in the absence of the petitioners were error, it could not have affected the sentences imposed; for the discussion involved solely a legal issue, the court's judgement was appealed and affirmed, and there is even now no contention that this legal issue was decided incorrectly.

ARGUMENT

I

PETITIONERS' MOTIONS TO VACATE SENTENCE COULD BE ENTERTAINED ONLY UNDER 28 U.S.C. 2255 AND THE UNITED STATES CAN APPEAL FROM THE GRANTING OF SUCH MOTIONS

Petitioners' motions to vacate their sentences were based upon a violation of their rights to be asked if they wished to speak before sentencing. The district court has jurisdiction to act upon motions bottomed on an illegal sentencing procedure under 28 U.S.C. 2255 but not under Rule 35, F.R. Crim. P. The court of appeals therefore correctly treated a government appeal from orders entered on these motions as an appeal from orders entered within the jurisdiction of the district court in collateral civil proceedings under 28 U.S.C. 2255. These orders, which concluded the Section 2255 proceedings at the same time they reopened the criminal cases, were plainly final orders under 28 U.S. C. 2255.

A. A MOTION TO VACATE SENTENCE FOR FAILURE TO OFFER THE RIGHT OF ALLOCUTION DOES NOT LIE UNDER RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

1. This issue was squarely decided over vigorous dissent twice during the last term of this Court. Rule 35, F. R. Crim. P., provides in part that the "court may correct an illegal sentence at any time." In *Hill* v. *United States*, 368 U.S. 424, this Court held that a denial of allocution rights under Rule 32(a) of the Federal Rules of Criminal Procedure does not render the sentence "illegal" within the meaning of Rule 35. In considering the applicability of Rule 35, the Court said (*id.* at 430):

> It is suggested that although the petitioner denominated his motion as one brought under 28 U.S.C. 2255, we may consider it as a motion to correct an illegal sentence under Rule 35 of the Federal Rules of Criminal Procedure. This is correct. *Heflin* v. *United States*, 358 U.S. 415, 418, 422. But, as the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to reexamine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.

This portion of *Hill* was reaffirmed in *Machibroda* v. *United States, supra,* 368 U.S. 487, 489. While the Court in *Hill* left open the question of availability of relief under 28 U.S.C. 2255 where the denial of allocution rights was surrounded by aggravating circumstances, the opinion is clear that a failure to accord the rights granted by Rule 32(a) before imposition of sentence, whether accompanied by circumstances of aggravation or not, does not result in an "illegal" sentence within Rule 35 and accordingly is not cognizable under that Rule.[2] This is a direct holding and not a mere implication, as petitioners suggest; and it has been recognized as such by the lower courts. *United States* v. *Cox,* 29 F.R.D. 475, 479 (W.D. Mo.).

2. The whole history and purpose of Rule 35, which is more fully discussed in the government's brief in *Hill* (Nos. 68 and 69, O.T. 1961, pp. 33–35),

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[2] Any possible suggestion in *Green* v. *United States,* 365 U.S. 301, that Rule 35 might be available in the circumstances of this case was overruled in *Hill.* In *Green,* four Justices of this Court believed the record to be too ambiguous to show whether the trial court failed to follow the formal requirements of Rule 32(a) before impositon of sentence and accordingly affirmed the denial of the Rule 35 application. The Court said that the defendant "failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees, and we therefore find that his sentence was not illegal." *Id.* at 305. Contrary to petitioner's assertion (Br. 31), *Green* did not "clearly contemplate" that challenges to sentences on grounds of a denial of allocution rights could properly be raised under Rule 35; the Court simply did not decide whether a failure to follow the requirements of Rule 32(a) would be cognizable on collateral attack or would make the sentence "illegal" within the meaning of Rule 35.

negates any attempt to expand Rule 35 to cover challenges to sentences because of alleged defects in the procedure leading up to sentencing, as distinguished from invalidity appearing from the judgment itself.

At common law, as well as in the federal courts, the rule prevailed that a court lost jurisdiction over its judgments, civil or criminal, at the end of the term of court at which the judgments were entered unless the court expressly carried over disposition of the case to a succeeding term of court. E.g., *United States* v. *Mayer*, 235 U.S. 55, 67–69; *United States* v. *Pile*, 130 U.S. 280. However, the uniform practice allowed a court to assume jurisdiction after term time where the judgment was "void" or "illegal," or where there were clerical mistakes in the judgment which needed correction. *Lockhart* v. *United States*, 136 F. 2d 122, 124 (C.A. 6); *Gilmore* v. *United States*, 124 F. 2d 537, 539 (C.A. 10), certiorari denied, 316 U.S. 661; *Gargano* v. *United States*, 140 F. 2d 118 (C.A. 9). The illegality subject to correction after term was limited to errors appearing on the face of the record, which did not involve going back into the transcript of the trial. See *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2), certiorari denied, 343 U.S. 979; *United States* v. *Zisblatt*, 172 F. 2d 740 (C.A. 2).

The Notes of the Advisory Committee to Rule 35 indicate that the first sentence of Rule 35 was but a continuation of "existing law." As the majority opinion in *Hill* v. *United States* noted, "Rule 35 was a codification of existing law and was intended to remove any doubt created by the decision in *United*

States v. *Mayer*, 235 U.S. 55, 67, as to the jurisdiction of a District Court to correct an illegal sentence after the expiration of the term at which it was entered." *Hill, supra*, 368 U.S. at 430 fn. 8.

The use of Rule 35 has for the most part been confined to these situations where the sentence, as disclosed by the record, was in excess of the statutory provision or in some way contrary to the applicable statute, as where multiple sentences were imposed for the same offense.[3] As this Court summed up the situation in *United States* v. *Morgan*, 346 U.S. 502, 506, the sentences subject to correction under Rule 35 are "those that the judgment of conviction did not authorize."

The remedy under Rule 35 has occasionally been applied in other situations, where illegality appeared on the face of the common law record, as in the cases holding sentences to be illegal because the defendant was not present. See *Cook* v. *United States*, 171 F. 2d 567 (C.A. 1), certiorari denied, 336 U.S. 926; *Crowe* v. *United States*, 200 F. 2d 526 (C.A. 6). In those cases the absence of the defendant appeared from the face of the judgment and therefore correction of the illegal sentence did not involve any consideration of the transcript, as distinguished from the judgment roll. Before the enactment of 28 U.S.C. 2255, some lower courts were disposed to expand the

[3] See *Callanan* v. *United States*, 364 U.S. 587; *Heflin* v. *United States*, 358 U.S. 415; See also *e.g.*, *Lockhart* v. *United States*, *supra*, 138 F. 2d 122 (C.A. 6) and cases cited therein; *Gargano* v. *United States*, 140 F. 2d 118 (C.A. 9); *Bugg* v. *United States*, 140 F. 2d 848 (C.A. 8), certiorari denied, 323 U.S. 673.

scope of Rule 35 so that a collateral remedy would be available in the sentencing court rather than in a different jurisdiction under habeas corpus. E.g., *Byrd* v. *Pescor*, 163 F. 2d 775 (C.A. 8), certiorari denied, 333 U.S. 846. But the necessity for any such expansion of Rule 35 beyond its recognized, historical limits disappeared with the enactment of 28 U.S.C. 2255, and there is now no justification for using Rule 35 to set aside judgments which were not erroneous on their face. This Court's decisions in *Hill and Machibroda*, holding that claims for denial of rights of allocution are not cognizable under Rule 35, were thus plainly correct.

B. THE ONLY AVAILABLE JURISDICTIONAL PROVISION FOR ATTACKING A FAILURE OF ALLOCUTION AFTER A FEDERAL PRISONER HAS BEEN CONVICTED AND SENTENCED AND HIS CONVICTION AND SENTENCE HAVE BEEN SUSTAINED ON APPEAL IS 28 U.S.C. 2255

Section 2255 of Title 28, in contrast to Rule 35, was intended to establish a general procedure for all collateral attacks on a final judgment of conviction. If the error in petitioners' sentencing was of such seriousness that it could be reviewed after final judgment and appeal,* review would lie solely under Section 2255 by way of a motion "to vacate * * * sentence" by a "prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence

* The mere failure to follow the formal commands of Rule 32(a) is grounds for appeal from the judgment of conviction and for resentencing in accordance with that Rule. *Van Hook* v. *United States*, 365 U.S. 609.

was imposed in violation of the * * * laws of the United States."

The scope of the remedy afforded by Section 2255 plainly extends to the granting of relief—in circumstances where collateral attack on a final judgment is appropriate—to a prisoner asserting that his sentence was illegally imposed. The history of this section, set forth in this Court's opinion in *United States* v. *Hayman*, 342 U.S. 205, shows that it was broadly designed to encompass all forms of collateral relief available in the federal courts to a person in custody under the sentence attacked. Indeed the reviser's note specifically states that the statute "provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." The remedy was designed to permit the sentencing court to grant the type of relief formerly available in the federal courts on habeas corpus. And from the time of *In re Mills*, 135 U.S. 263, and *In re Bonner*, 151 U.S. 242, habeas corpus was recognized as an appropriate remedy for a claim that a sentence had been illegally imposed.

Petitioners themselves acknowledge that this Court, in the decision in *Hill* v. *United States*, 368 U.S. 424, indicated that the remedy under 28 U.S.C. 2255 might be appropriate to correct an illegal sentencing procedure, although it ruled that a mere denial of the right of allocution was not a sufficient ground for collateral attack on a criminal judgment. The Court left open the question whether 28 U.S.C. 2255 would be an appropriate remedy to challenge sentences imposed in violation of Rule 32(a) where "aggravating

circumstances" were present, saying (368 U.S. at p. 429):

> It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule.

This is more than an implicit recognition that if relief is available at all, it is in a proceeding under 28 U.S.C. 2255. Significantly, since *Hill*, four courts of appeals have assumed that where "aggravating circumstances" accompanied a denial of allocution rights under Rule 32(a), the sentence is subject to collateral attack under 28 U.S.C. 2255. *E.g.*, *Hoyland* v. *United States*, 304 F. 2d 853, 854 (C.A. 7); *United States* v. *Bebik*, 302 F. 2d 335, 337 (C.A. 4); *Rosa* v. *United States*, 301 F. 2d 630, 630–631 (C.A. 5); *Hood* v. *United States*, 307 F. 2d 507, 508 (C.A. 8); *Hughes* v. *United States*, 304 F. 2d 91, 94 (C.A. 5); *United States* v. *Taylor*, 303 F. 2d 165, 167 (C.A. 4).

The suggested "enormous" practical difficulties in treating an attack on a sentence as a proceeding under 28 U.S.C. 2255 (Pet. Br. 33-35) are non-existent. A major purpose of the remedy under 28 U.S.C. 2255 was to have the original record in the criminal proceedings available in determining whether there was any validity to the collateral attack on the judgment. See *United States* v. *Hayman*, 342 U.S. 205, 213-214. Thus, the statute specifically provides for a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief". The original record is always made part of a proceeding under 28 U.S.C. 2255 and there is no more trouble in getting the original record before an appellate court in a proceeding under 28 U.S.C. 2255 than there would be in a proceeding under Rule 35. It is true that, under 28 U.S.C. 2255, a prisoner is not entitled to attack a judgment while he is not serving the sentence (*Heflin* v. *United States*, 358 U.S. 415), but the remedy would be available as soon as his term commenced. Moreover, that situation could arise only very rarely with respect to the right of allocution. If a defendant was not asked to make a statement before sentencing, that denial would normally go to all counts.

It is thus clear that the only statutory power granted to the district courts by Congress to consider a post-appeal attack on the method of imposing sentence is under the general provisions of 28 U.S.C. 2255. Not every error in imposing sentence justifies collateral attack after judgment and appeal. But the only av-

enue for attacking the procedures followed in imposing sentence after appeal is under Section 2255.

C. FOR PURPOSES OF DETERMINING APPEALABILITY, A DISTRICT COURT'S ORDER GRANTING A MOTION TO VACATE A PRISONER'S SENTENCE ON GROUNDS OF A VIOLATION OF HIS RIGHTS OF ALLOCUTION IS NECESSARILY VIEWED AS IF GRANTED UNDER THE ONLY STATUTORY PROVISIONS (28 U.S.C. 2255) CONFERRING UPON THE DISTRICT COURT JURISDICTION TO ENTERTAIN SUCH A MOTION

Each petitioner filed a motion to vacate sentence on the ground that he was not afforded an opportunity to make a statement in his own behalf as provided in Rule 32(a), Federal Rules of Criminal Procedure (R. 35, 49). Petitioner Donovan made clear his belief that his motion would lie under Rule 35 of the Federal Rules of Criminal Procedure. Petitioner Andrews merely requested the same relief granted Donovan. The district court granted both motions without indicating under what statutory authority it was acting.

Against this factual background and considering the district court's lack of power to grant relief under Rule 35, the court of appeals correctly treated the district court's decision and order as having been made under 28 U.S.C. 2255, the only provision under which petitioners' motions for relief could be entertained and decided on the merits. There was no reason for the court of appeals to assume that the district court had acted beyond its statutory jurisdiction.

Moreover, the court of appeals could not have denied review even if the district court had stated explicitly, though erroneously, that it was acting under Rule 35. Section 2255 of the Judicial Code grants

the courts of appeals jurisdiction over appeals from the ordered "entered on the motion" "to vacate * * * sentence" made by a "prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the * * * laws of the United States." These words apply precisely to the orders entered by Judge Murphy on the motions to vacate the sentences of the petitioners in this case. Just as the jurisdiction of the sentencing court under Section 2255 does not depend upon how the prisoner labels his motion, so the statutory jurisdiction of the court of appeals under 28 U.S.C. 2255 does not depend upon the label chosen either by the prisoner or by the district court. The content of the motion upon which the order was granted is decisive, *i.e.*, the relief requested and the grounds given for demanding that relief. See e.g., *Mitchell* v. *United States*, 368 U.S. 439; *Hill, supra*, 368 U.S. at 430.

It is thus clear that the plain language of the appeal provisions of Section 2255 makes the government's right to appeal turn on whether the motion was one within the jurisdiction of the district court under 28 U.S.C. 2255, that is, upon the actual authority for the district court's order and not upon the label attached. This is necessitated by basic requirements of fairness. If a prisoner states a valid claim for relief under 28 U.S.C. 2255 but labels his motion under the Federal Rules of Civil Procedure, the district court is still obligated to consider the motion under the correct jurisdictional provision and grant it if it is meritorious. Similarly, if the district court

correctly grants the motion but erroneously labels its order under an inapplicable statute, the court of appeals has jurisdiction to review the proceeding as if from an order under the proper statute and cannot reverse the order granting the prisoner relief simply because the prisoner and the district court have mislabeled the motion and order.

In the present case the district court had jurisdiction to hear the petitioners' motions under 28 U.S.C. 2255 but not under Rule 35. If it had denied the motions on the sole ground that it had no jurisdiction under Rule 35, the court of appeals would have had to reverse the decision for consideration of the claim under 28 U.S.C. 2255 because the relief asked and the grounds stated fell within the jurisdictional ambit of that section. When the district court instead granted the motions without specifying the source of its statutory authority, the court of appeals properly treated the district court's orders as having been issued—correctly or incorrectly—under the only statute granting such jurisdiction, 28 U.S.C. 2255.

D. THE DISTRICT COURT'S ORDERS GRANTING MOTIONS TO VACATE SENTENCE WERE FINAL ORDERS IN COLLATERAL PROCEEDINGS AND THUS REVIEWABLE BY THE COURT OF APPEALS

An action to vacate or set aside a sentence under 28 U.S.C. 2255 is a civil action independent of the criminal case, *United States* v. *Hayman*, 342 U.S. 205. It is in this respect analogous, not only to habeas corpus proceedings, but to independent actions to set aside a civil judgment. See *Stevirmac Oil & Gas Co.* v. *Dittman*, 245 U.S. 210. An order either granting or denying the motion to set aside the judgment

terminates the collateral civil proceeding and is final and appealable as such. Indeed, in 28 U.S.C. 2255 Congress specifically provided that:

> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

In the present case each petitioner filed a motion to vacate his sentence as illegally imposed. Although petitioner Donovan also asked that he be properly resentenced (R. 35), this portion of his request for relief was surplusage. Each petitioner was granted all the relief he was entitled to ask when his sentence was set aside. The petitioners had no interest in then being resentenced. The district court's orders terminated the authority of the United States to hold the petitioners in custody under their prior sentences; any further custody would be under other authority and under later judgments than the judgments attacked by their motions. This was the full relief sought by petitioners in filing their motions.

It is, of course, true that the effect of the district court's orders granting the motions to vacate sentence was to cause the original criminal judgment to become non-final. But the orders themselves constituted the final disposition of a separate and collateral attack in a civil proceeding (under Section 2255) on the criminal sentences. Nothing more remained to be done in these collateral proceedings. Any resentencing would take place as part of the criminal proceeding reopened by the final order in the civil proceeding under 28 U.S.C. 2255. The orders of the district court were therefore reviewable at once.

It is firmly established that review of the final order in a collateral attack on a conviction or sentence need not await the outcome of the criminal judgment which is made non-final by the result of the collateral attack. The normal result of a successful motion under 28 U.S.C. 2255 is a new trial which may result in the same or a greater sentence for the prisoner, but the United States is free to appeal at once from the judgment terminating the proceeding under Section 2255.[4] Thus, for example, in *United States* v. *Kelly*, 269 F. 2d 448 (C.A. 10), certiorari denied, 362 U.S. 914, the district court vacated judgments of conviction because, in the hearing under 28 U.S.C. 2255, the government refused to produce certain F.B.I. files relating to the original case, as ordered by the court. In response to the defendant's argument that an appeal from the grant of the motion was really from the order to produce, the court said:

> * * * The Government did not appeal from the directive of the court for the production of the files. The appeal was taken from the order vacating and setting aside the judgments and sentences in the two criminal cases. Such order was predicated upon the refusal to make the files available to the court. But the *scope and effect of the order was to vacate and set aside the judgments and sentences in the two*

[4] Section 2255 of Title 28 authorizes an appeal from the order entered on the motion "as from a final judgment in applications for a writ of habeas corpus." The right of the United States to appeal from final judgments entered in habeas corpus cases is well recognized. E.g., *Craig* v. *Hecht*, 263 U.S. 255, 277; *Collins* v. *Miller*, 252 U.S. 364, 371; *Tang Tun* v. *Edsell*, 223 U.S. 673, 682; *United States* v. *Ju Toy*, 198 U.S. 253, 259; *United States* v. *Jung Ah Lung*, 124 U.S. 621, 625, 626.

criminal cases. And an order of that kind is open to appeal by the Government. [Emphasis added.]

The effect of the order in *Kelly* was to require a new trial, and in that sense something further remained to be done in the criminal case just as resentencing would remain to be done in this case if Judge Murphy's orders had not been reversed. However, there, as here, the judgments in the proceeding under 28 U.S.C. 2255 were final because they ended the proceeding to vacate existing final judgments. See also *United States* v. *Williamson,* 255 F. 2d 512, 515 (C.A. 5), certiorari denied, 358 U.S. 941.

The finality of the order is further illustrated by this Court's judgment in *In re Bonner,* 151 U.S. 242. The Court issued a writ of habeas corpus as an appropriate remedy for correction of an illegal sentence, even though it specifically held that the grant of the writ did not affect "the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him" (151 U.S. at 262). In other words, there was a termination of the habeas corpus proceeding by the grant of the writ, even though further proceedings could be had, consistently with this Court's final judgment, in the district of trial on a criminal judgment which, by virtue of the final ruling in habeas corpus, had become non-final in that there was no valid sentence in effect.

It is thus plain that the district court's orders granting petitioners' motions to vacate sentence were final and correctly held to be appealable under the provisions of 28 U.S.C. 1291 and 2255.

II

PETITIONERS' MOTIONS TO VACATE THEIR SENTENCE AFTER CONVICTION AND APPEAL SHOULD HAVE BEEN DENIED BY THE DISTRICT COURT

In denying collateral relief under 28 U.S.C. 2255 for a violation of Rule 32(a), this Court stated in *Hill* v. *United States* (368 U.S. at 429):

> It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule.

It is the petitioners' contention that this case involves such "aggravating circumstances" that collateral relief should have been available despite the holding of *Hill*. We submit that there are no meaningfully aggravating circumstances present in this case and that, to the contrary, there were significant ameliorating circumstances making the failure to hear the defendants prior to sentencing far less serious than is ordinarily the case.

A. THERE ARE CIRCUMSTANCES AMELIORATING THE EFFECTS OF THE DISTRICT COURT'S FAILURE TO ASK THE DEFENDANTS IF THEY WISHED TO BE HEARD PRIOR TO SENTENCING

The present case was remanded to the district court in 1957 for the sole purpose of having that court exercise the limited choice available to it of probation or the mandatory sentence of twenty-five years. There is thus no reasonable possibility that anything which petitioners wished the district court to hear would not have been marshalled by their attorneys, who specifically directed themselves to this question. The attorneys in fact addressed the district court at some length with respect to each individual petitioner, setting forth in detail those circumstances of background and those hardships of sentence which might have led the court to grant probation. A review of the statements of counsel prior to sentencing (R. 27–30) leaves little room for doubt that every extenuating circumstance known to the petitioners was brought forward by their attorneys. Neither petitioner asked to add anything to the statements of counsel.

The conclusion that these petitioners received substantially all the benefits of a right of allocution is confirmed by the fact that they did not make any reference to this issue on appeal to the court of appeals after resentencing or in their petitions for writs of certiorari, although issues as to the sentence were raised and argued. In these circumstances the district court's failure to ask the defendants if they wished to speak before sentencing was not so serious an error as to be reviewable on collateral attack on their convictions.

B. THERE ARE NO CIRCUMSTANCES SIGNIFICANTLY AGGRAVATING THE FAILURE OF THE DISTRICT COURT TO COMPLY WITH THE REQUIREMENTS OF RULE 32(a)

Despite the careful presentation of every extenuating circumstance by counsel for the petitioners, petitioners now contend that there were two main aggravating circumstances distinguishing this case from *Hill* and making collateral relief appropriate.[5] We submit that neither circumstance realistically affected the rights of the petitioners in this case.

1. There were no aggravating effects of the short discussion by counsel for all parties prior to the appearance of the defendants and Mr. Healy

Immediately upon opening the hearing on resentencing in this case the district judge inquired, "Are the defendants present?" Mr. Friedman, counsel for all three defendants, replied that they were on their way up and then at once began discussing the power of the district court to sentence on the lesser of two merging offenses. Mr. Friedman's argument lasted the greater part of the few minutes of discussion

[5] Petitioners also list a third "aggravating circumstance"—an asserted failure of the district court to comply with Rule 32(a) at the initial sentencing of the petitioners in 1954 (Pet. Br. 43, fr. 36).—However, even if the alleged violation of Rule 32(a) appeared from the record with the clarity required by *Green* v. *United States*, 365 U.S. 301 (and it does not (Pet. Br. App. 53-54)), this prior violation of the rule would not constitute an "aggravating circumstance," for it had nothing at all to do with any violation of the petitioners' rights at the 1957 resentencing procedures, which resulted in the judgments under which petitioners are now held and which are alone in issue in this case.

before the defendants arrived, although Mr. Matthews, the government attorney, briefly responded with an argument that fills merely a page of the printed record. The court then terminated the discussion because of the continued absence of the defendants. It is this discussion prior to the arrival of the defendants, and, perhaps, prior to the arrival of Mr. Healey (who, along with Mr. Friedman, represented petitioner Donovan) that is said to constitute the primary aggravating circumstance in this case.

No facts which could possibly have been relevant to the exercise of the district court's discretion in sentencing or to which either petitioner could possibly have wanted to respond were brought out during this discussion. Nor do petitioners contend that the result of this discussion was an erroneous decision on the legal question discussed. The district court had no choice as to the counts on which it could impose sentence—the subject of defense counsel's argument to the court prior to the arrival of the defendants. As shown by the Statement, *supra*, the district court in 1954 did not impose sentence on count one charging assault on a postal employee with intent to rob. The court of appeals held that the court was correct in this regard since that count merged into count two which charged the aggravated form of that offense. 242 F. 2d at 64. The court of appeals specifically remanded the cause for resentencing on count two since the district court had erroneously concluded that it could not grant proba-

tion in view of the mandatory sentence. Thus nothing that could have been said—whether in the presence or absence of the petitioners—could have altered the clear-cut remand from the court of appeals or convinced the district court that it had power to impose sentence on count one. Indeed, this question was appealed, the district court's decision affirmed, and certiorari denied after resentencing, thus establishing for this case the correctness of the district court's decision on the issue briefly discussed by counsel prior to the petitioners' arrival. There is therefore no way in which the absence of the defendants or of Mr. Healey during ths discussion could have affected correct sentencing.

It is also clear, we submit, that it was not error to allow thás short discussion to take place prior to the arrival of the defendants. Such discussions of legal issues regularly take place outside of the hearing of the defendants during a criminal trial when there is a conference on questions of law between the court and counsel for both sides at the bench, in the robing room, or in chambers.[6] It was entirely proper for the attorneys to make some preliminary remarks to the court while waiting for the defendants to arrive. The court was not obliged to maintain absolute silence during this short period. None of the cases

[6] See *United States* v. *Hetherington*, 279 F. 2d 792, 796 (C.A. 7), certiorari denied, 364 U.S. 908; *United States* v. *Switzer*, 252 F. 2d 139, 145 (C.A. 2), certiorari denied, 357 U.S. 922; *Deschenes* v. *United States*, 224 F. 2d 688, 693 (C.A. 10).

cited by petitioners even remotely suggests anything to the contrary.[7]

Petitioner Donovan's additional complaint (Pet. Br. 41–42) that one of his attorneys, Mr. Healey, was not present during these preliminary proceedings is not substantial. Donovan was represented by Mr. Friedman throughout the entire discussion (R. 20). Petitioner's suggestion that Mr. Friedman spoke only for Andrews and not for Donovan during this time is directly and convincingly refuted by the record (R. 20–24). Moreover, the arguments made by Mr. Friedman during the time Mr. Healey may have been absent (the record is not clear on this point) were readvanced by Mr. Friedman in the presence of Mr. Healey at the conclusion of the sentencing proceedings (R. 32–33) and Mr. Healey had nothing to add at that time.

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[7] The cases relied upon by the petitioners are inapposite (Pet. Br. 39–41). All of them deal with situations where the defendant is absent during his actual sentencing or where the court has in some way altered the sentence in the absence of the defendant. *E.g.*, *Pollard* v. *United States*, 352 U.S. 354 (absence of the defendant when court suspended sentence and placed him on probation); *Crowe* v. *United States*, 200 F. 2d 526 (C.A. 6) (absence of defendant when court amended probation order); *Anderson* v. *Denver*, 235 Fed. 3 (C.A. 8) (absence of defendant at sentencing proceedings); *Cook* v. *United States*, 171 F. 2d 567 (C.A. 1), certiorari denied, 336 U.S. 926 (absence of defendant when court added fine to sentence); *Montgomery* v. *United States*, 134 F. 2d 1 (C.A. 8) (absence of defendant when sentences amended to provide for consecutive terms of imprisonment).

2. The Court was not misinformed

Petitioners also argue (Pet. Br. 42) that the court at the time of resentencing was misinformed as to Andrews' participation in the attempted robbery, and that this was an "aggravating circumstance" within the meaning of *Hill*. To support this, petitioners point to the resentencing proceedings where Judge Walsh, in refusing to suspend sentence as to the petitioners, referred to them as "the two men who perpetrated the holdup of the truck"; and to the fact that, in suspending sentence as to Cohen, Judge Walsh said that if Cohen had been with the petitioners "on the truck," or had "been there" with petitioners who had "committed the holdup," he would have sentenced Cohen to imprisonment for twenty-five years (R. 31–32) (Pet. Br. 8, fn. 6, and 42).

The record, however, unambiguously refutes the contention that the court was misinformed. Judge Walsh was the trial judge of the case in 1954. Immediately prior to resentencing the petitioners, the court was reminded of the facts of the case by the United States Attorney who said (R. 25–26):

> As you will recall, there was a holdup with a revolver of the United States mail truck. The actual attempted holdup with the revolver *was performed by Donovan. The person who planned and helped execute the holdup was the defendant Andrews, and Mr. Cohen's part in it was that he was an employee of the post office* at that time, *and he informed Andrews,* who in turn informed Donovan as to what truck they though [*sic.*] held the money and

> registered mail. And, of course, he was aware that a holdup was to take place and it was to be an armed robbery. [Emphasis added.]

In addition, the court had before it a presentence report on the defendants (R. 26); and the facts of the case were set out in the opinion of the court of appeals which remanded the cause for resentencing on count two. Moreover, the court was further reminded during the resentencing proceedings that Donovan was the one who boarded the mail truck. Counsel for Donovan told the court (R. 28):

> Now, this was an unsuccessful attempt by these men with regard to this matter, and with regard to what happened *on the truck, Donovan,* who, I understand, at one time wrote a letter saying that he was willing to take a lie detector test, that he *never had the gun in his possession, to go ahead and commence the holdup of the truck and put the life of the driver in jeopardy,* but be that as it may he was convicted. [Emphasis added.]

After counsel completed their statements, the court concluded that it would not suspend sentence as to the petitioners—"the two men who perpetrated the holdup" (R. 30–31). The court was entirely correct that both petitioners perpetrated the holdup. Both petitioners were at the scene of the attempted robbery and, on a signal from Andrews, Donovan, who was dressed as a postal employee, entered the cab of the mail truck when the driver stopped for a traffic light. Donovan pointed a loaded gun at the driver, but further operations were frustrated when the truck was surrounded by federal agents. Andrews was

arrested while fleeing from the scene of the attempted robbery. See *United States* v. *Donovan*, 242 F. 2d at 62; Government's Brief in Opposition, *Andrews* v. *United States*, No. 992 Misc., O.T. 1959, p. 2; Government's Brief in Opposition, *Donovan* v. *United States*, No. 97 Misc., O.T. 1958, p. 7. The court was fully aware of both petitioners' direct participation in this substantive offense, when, in refusing to suspend sentence, it said (R. 31): "I am sorry to say I do not think I can suspend sentence and permit you to serve only the sentence that a person has to serve *who has conspired but did not carry out the crime.*" (Emphasis added.)

The statements Judge Walsh made to Cohen did not show that he was misinformed as to Andrews' participation in the attempted robbery. Judge Walsh suspended sentence as to Cohen because he was not "with the other two on the truck," because Cohen "had [not] been there" with the petitioners "who [had] committed the holdup" (R. 31–32). The great significance which petitioners attach to the words "on the truck" overlooks the basic fact that Judge Walsh was aware of both petitioners' direct participation and presence at the scene of the attempted robbery as distinguished from the indirect participation and absence from the scene of Cohen. This was the criterion—not who was physically "on the truck"—which Judge Walsh relied upon to differentiate Cohen's participation and suspend sentence as to him. The context in which the words "on the truck" were spoken shows that the judge was thinking of the direct participation in the robbery by both petitioners as dis-

tinguished from Cohen's indirect participation. It certainly cannot be said that this single remark to Cohen had the effect of casting doubt upon the knowledge which Judge Walsh had of the nature of Andrews' participation in the crime, a subject on which he was carefully informed by a number of sources immediately prior to sentencing.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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